(17)

No. 97-1287

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND
HUGHES NON-BARGAINING RETIREMENT PLAN,
Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH,
ROBERT E. MCMILLIN, ERNEST O. BLANDIN,
AND RICHARD E. HOOK,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals For the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1/]

The American Association of Retired Persons (AARP), a nonprofit membership organization of more than 30 million

[1/] No counsel for any party authored any portion of this brief. No persons other than AARP, its members, or its counsel have made a monetary contribution to the preparation and submission of this brief. Some of the Respondents may be AARP members and pay AARP membership dues.

Americans age 50 or older, is dedicated to addressing the needs and interests of older persons. One of AARP's primary objectives is to promote the economic security of individuals as they age. AARP seeks to increase the availability, security, equity, and adequacy of public and private pension plans through educational and advocacy efforts.

Many of AARP's members, working and retired, are participants and beneficiaries in employer-sponsored pension plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. These AARP members, as well as other older Americans, depend on these pension plans and the retirement benefits paid from them for their economic security in retirement.

As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving ERISA, including *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

It is vitally important to AARP members to ensure that employers do not illegally siphon a plan's surplus for corporate needs.[2] AARP members and other older

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[2] Due to the stock market's surge during the last fifteen years, pension assets have grown exponentially, resulting in large surpluses. Tim Smart, *Swollen Pension Funds, Surprise Profits*, WASHINGTON POST, June 14, 1998, at H1. These surpluses may tempt employers to illicitly utilize plan assets. However, as more fully explained below, an employer's use of surplus plan assets may be restricted by ERISA's fiduciary rules.

Americans have a significant interest in ensuring that the plan's assets will be available to pay the retirement benefits to which they are entitled and that plan assets are used exclusively for the benefit of participants and beneficiaries. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); *cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 & n.8 (1985) (ERISA was passed to prevent the misuse and mismanagement of plan assets). In particular, the statutory scheme established by Congress for distribution of benefits upon a plan termination must not be compromised.

Accordingly, this case will have a direct bearing on the economic security of millions of Americans, including members of AARP. In light of the significance of these issues to AARP and its members, AARP respectfully submits this brief *amicus curiae*.[3]

SUMMARY OF ARGUMENT

This case presents an opportunity to establish guidelines for analyzing the circumstances under which an employer can be liable for a breach of fiduciary duty as a result of a plan amendment. AARP submits that the guidelines it has identified below will provide considerable assistance to lower courts in their efforts to define the phrase "generally free" to amend.

Employers are "generally free" to amend their employee benefit plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). But no substantive provision of ERISA may be violated, no express term of the plan's governing documents may be violated, and ERISA's

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[3] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

procedures for adopting an amendment must be followed. *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990). Even if the amendment does not violate any provision of ERISA, an employer's implementation of a plan amendment may nonetheless violate ERISA's fiduciary rules. *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988); *McKinnon v. Cairns*, 698 F. Supp. 852, 862 (W.D. Okla. 1988); *District 65, United Auto Workers v. Harper & Row Publishers, Inc.*, 696 F. Supp. 29, 33 (S.D.N.Y. 1988). Consequently, an employer may be liable for a breach of fiduciary duty through implementation of the amendment if the employer is a named fiduciary, ERISA § 402(a), 29 U.S.C. § 1102(a); the trustee or plan administrator, ERISA §§ 3(14), (16), 29 U.S.C. §§ 1002(14), (16); or a functional fiduciary, ERISA § 3(21), 29 U.S.C. § 1002(21).

Moreover, when a fiduciary makes a decision concerning plan assets attributable to employee contributions, it must be subject to even stricter scrutiny than a decision concerning plan assets attributable to employer contributions because ERISA itself treats employee contributions with special deference. *See generally Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982); ERISA §§ 203(a)(1), 204(c), 29 U.S.C. §§ 1053(a)(1), 1054(c); ERISA § 4044(a), (d)(3), 29 U.S.C. § 1344(a), (d)(3); 29 C.F.R. § 2510.3-102 (1997); 61 Fed. Reg. 41,220 (1996).

Finally, Congress established an unambiguous mechanism for distribution of benefits. ERISA clearly sets forth the benefits to which a participant is entitled, both prior to, and upon, termination. Participants are entitled to either their promised defined benefit or their own contributions plus interest, whichever is greater. ERISA

§ 204(c)(2)(B)-(C), 29 U.S.C. § 1054(c)(2)(B)-(C). Upon plan termination, after all plan liabilities are satisfied, participants are entitled to their proportionate share of any surplus. ERISA § 4044(d)(3), 29 U.S.C. § 1344(d)(3).

ARGUMENT

I. THE ACT OF AMENDING A PLAN DOES NOT ABSOLVE AN EMPLOYER OF FIDUCIARY LIABILITY.

A. The Lower Courts Need More Comprehensive Guidelines for Analyzing Fiduciary Breach Allegations Arising from an Employer's Amendment of its Plan.

Although this Court has recently decided two cases, holding that an employer cannot violate ERISA's fiduciary rules solely by amending its plan, *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), plainly the lower courts continue to struggle to define the exceptions implicit in the Court's use of the phrase "generally free" to amend. AARP submits that this case presents the Court with the opportunity to establish guidelines for the lower courts to use for analyzing fiduciary breach allegations arising from an employer's plan amendment.

B. An Employer Is Generally Free to Amend its Employee Benefit Plan as Long as ERISA's Substantive Provisions, the Express Terms of the Plan or ERISA's Procedures Are Not Violated.

This Court has made it clear that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans." *Curtiss-Wright*, 514 U.S. at 78. This holding was extended to pension plans in *Spink*, 517 U.S. at 889-90.

Although both of these cases involved employer contributory plans, for the purpose of amending employee benefit plans, ERISA's statutory provisions do not differentiate between types of plans based solely on their sources of funding. *See generally* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) (the definition of fiduciary does not include plan design in the defined functions nor distinguish between funding sources).[4]

Nevertheless, employers do not have a completely unfettered right to amend their employee benefit plans. ERISA imposes several restrictions. Employer amendments cannot violate ERISA's substantive provisions such as its detailed accrual and vesting provisions. For example, if an employer amended its plan to require 15 years of service credit in order to vest in a pension, the employer would violate ERISA § 203(a), 29 U.S.C. § 1053(a). The employer would not be free to amend its plan to include such a provision. *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994). Moreover, if an employer fails to follow ERISA's procedures in adopting an amendment or providing employees with notice of the amendment, the amendment may not be effective. *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990). Nor can amendments violate the express terms of the plan, trust agreement,

[4] Congress did differentiate in some circumstances based on the source of the funding. *See, e.g.*, ERISA §§ 203(a)(1), 204(c), 29 U.S.C. §§ 1053(a)(1), 1054(c); ERISA § 4044(a), (d)(3), 29 U.S.C. § 1344(a), (d)(3); 29 C.F.R. § 2510.3-102 (1997); 61 Fed. Reg. 41,220 (1996). Congress could have differentiated between plans based on sources of funding concerning amendment of plans, but chose not to do so. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997) ("Had Congress intended . . . , it could have easily. . . .").

collective bargaining agreement or other governing documents. For example, if the plan terms expressly prohibit any amendments to the benefit accrual rules, an employer could not amend its plan to change these rules. *Id.*

Accordingly, employers are generally free to amend their employee benefit plans as long as no substantive provision of ERISA is violated, no express term of the plan's governing documents is violated, and ERISA's procedures for adopting an amendment are followed.

C. An Employer's Amendment of a Plan Does Not Necessarily Immunize its Post-amendment Actions.

1. Implementing a plan amendment may give rise to an ERISA fiduciary violation.

Although an employer is generally free to amend its plan at any time, AARP submits that an employer may still violate ERISA when implementing the plan amendment. *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (in plan termination, misuse of plan assets to further interests other than those of participants and beneficiaries states a claim upon which relief can be granted); *McKinnon v. Cairns*, 698 F. Supp. 852, 862 (W.D. Okla. 1988) (improper calculations of reversion of plan assets states a claim for fiduciary breach); *District 65, United Auto Workers v. Harper & Row Publishers, Inc.*, 696 F. Supp. 29, 33 (S.D.N.Y. 1988) (implementation of plan termination involves fiduciary functions).

An example illustrates that an employer may not be liable under ERISA's fiduciary provisions solely for amending a

plan,[5] but the plan's fiduciaries may be liable under those same provisions for implementing that amendment:

> In 1988, an employer amends its plan to prohibit any investment in securities. The plan trustees follow the instructions of the amendment and invest all of the plan's assets in bonds and money market instruments. They continue to do so until sued in 1998. Due to the rising stock market, the plan's investments annually lose the opportunity for double-digit investment gains. The trustees' adherence to the employer's plan amendment will result in a violation of ERISA's fiduciary rules based on the trustees' continued failure to diversify and their lack of prudence in investing the assets of the plan. *See, e.g.*, ERISA § 404(a)(1)(B)-(C), 29 U.S.C. § 1104(a)(1)(B)-(C). Accordingly, the plan trustees' implementation of the employer's amendment is a fiduciary violation.

However, the plan trustees have an alternative to following the employer's instructions set forth in the plan amendment. The trustees can chose to ignore the employer's instructions and refuse to implement the amendment. If the trustees do not implement the plan amendment, then the trustees will not violate ERISA's diversification and prudence provisions. Indeed, such inaction is consistent with ERISA's mandate in section 404(a)(1)(D) requiring fiduciaries to ignore any plan provision if it violates any provision of title I or title IV of ERISA. 29 U.S.C. § 1104(a)(1)(D) (a fiduciary must follow plan documents *insofar as they are consistent with title I and title IV. . . .*).

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[5] As we have previously stated in Section I.B, *supra*, the employer may be liable for a violation of ERISA's substantive provisions.

Accordingly, fiduciaries must independently review and analyze plan amendments in order to determine whether they violate any provision of title I or title IV including ERISA's fiduciary provisions. *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307, 310, 314 (8th Cir. 1979) (ERISA § 404(a)(1)(D) was violated when fiduciaries followed the plan's "bad boy" clause); *Central Trust Co., N.A. v. American Avents Corp.*, 771 F. Supp. 871, 875-76 (S.D. Ohio 1989) (trustee correctly ignored pass-through voting provisions and exercised independent judgment concerning sale of ESOP's stock); *Mobile, Alabama-Pensacola, Florida Building & Construction Trades Council v. Daughtery*, 684 F. Supp. 270, 282 (S.D. Ala. 1988) (plan provisions providing lifetime tenure for trustees could not be given effect under ERISA § 404(a)(1)(D)); *see generally* RESTATEMENT (SECOND) OF TRUSTS § 167 (1959) (the court will permit the trustee to deviate from the trust if compliance would impair the purposes of the trust).

2. An employer may be a fiduciary and thus breach its fiduciary duty when implementing a plan amendment.

ERISA plainly recognizes that an employer may wear two hats when involved with an employee benefit plan. *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985). ERISA § 408(c)(3) states that the fiduciary rules shall not prohibit any fiduciary from "serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest." 29 U.S.C. § 1108(c)(3). And, this Court has recognized that an employer may wear more than one hat when communicating with participants about its benefit plan. *See, e.g., Varity Corp.*, 516 U.S. at 498 ("Varity was *both* an employer and the benefit plan's administrator. . . ") (emphasis added).

An employer may be accorded fiduciary status in three ways. First, the employer may be a "named fiduciary" under the plan documents.[6] ERISA § 402(a)(1)-(2), 29 U.S.C. § 1102(a)(1)-(2) ("a fiduciary who is named in the plan instrument, or who . . . is identified as" such by the employer); 29 C.F.R. § 2509.75-5, at FR-3 (1997) (a corporation may be designated a "named fiduciary"). Unlike a functional fiduciary pursuant to ERISA § 3(21), a named fiduciary is a fiduciary for all purposes. *Birmingham v. SoGen-Swiss International Corp. Retirement Plan*, 718 F.2d 515, 521-522 (2d Cir. 1983); *Arakelian v. National Western Life Ins. Co.*, 680 F. Supp. 400, 404 (D.D.C. 1987).

Second, the employer may act as the trustee or plan administrator of the plan which automatically establishes fiduciary status. ERISA § 3(14), 29 U.S.C. § 1002(14) ("any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian) . . . ."); 29 C.F.R. § 2509.75-8, at D-3 (1997) (certain positions such as trustee or plan administrator "by the very nature of [their] position" must be fiduciaries). Indeed, where no plan administrator is designated, then the plan sponsor (generally the employer) is considered the plan administrator by default. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

The third way occurs when the employer acts as a fiduciary. "[T]o the extent" that an employer "exercises any discretionary authority or discretionary control respecting management" of the plan, or "has any discretionary authority or discretionary responsibility in the administration" of the plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), the employer is a fiduciary. Consequently, those persons, including employers, who carry out functions relating to asset management, plan administration and provision of investment advice for a fee are usually held to be fiduciaries.

This Court has recognized that a person can be a fiduciary for some purposes but not for others. *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-97 (1993). *Varity Corp. v. Howe* elaborates on *Hancock* to hold that an employer may be a fiduciary to the extent that it has discretionary authority relating to plan administration. 516 U.S. at 498. In *Varity*, the employer provided information to plan participants about plan benefits and used persons for these communications who employees knew had the authority to act as fiduciaries; communications about plan benefits are the type of duties that a trust document imposes upon persons who administer the plan; the message communicated was the type of message persons who administer the plan would have conveyed. *Id.* at 502-04. These activities indicated that when communicating with plan participants over the stability of their benefits the employer was engaging in plan administration. *Varity*'s broad reading of ERISA's definition of fiduciary is in harmony with this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248, 261-62 (1993), which acknowledged that ERISA's functional definition of fiduciary expands "the universe of persons subject to fiduciary duties . . . . "

Consistent with these Supreme Court cases is the circuit courts' recognition that employers may be fiduciaries based on certain activities, but not others. For example, an employer's appointment of plan fiduciaries, and subsequent monitoring of their activities, are fiduciary functions. *See*

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[6] The reason for requiring a "named fiduciary" is so that employees may know who is responsible for operating and administering the plan. H.R. Conf. Rep. No. 93-1280, at 297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5081; 29 C.F.R. § 2509.75-5, at FR-1 (1997).

29 C.F.R. § 2509.75-8, at D-4 (1997); *accord*, *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 735-36 (7th Cir. 1986); *Birmingham v. SoGen-Swiss International Corp. Retirement Plan*, 718 F.2d 515, 521-522 (2d Cir. 1983). An employer may become a fiduciary if it exercises *de facto* control over plan administration or plan assets. *See, e.g.*, *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986) (if employer controlled trustees' decision to sell stock, it became a fiduciary); *see Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (union official became fiduciary by choosing service provider); *cf. United States v. Grizzle*, 933 F.2d 943, 947-48 (11th Cir. 1991) (in *dictum*, employer becomes a fiduciary when misappropriating employee contributions to plan).

Thus, an employer may be liable for a breach of fiduciary duty when implementing a plan amendment if the employer is a named fiduciary, the trustee or plan administrator, or a functional fiduciary. What must be done, then, is to separate those actions an employer takes as a fiduciary which are regulated by ERISA from those actions an employer takes as a business entity which are unregulated by ERISA.

D. Transactions with Plan Assets Which Include Employee Contributions Must Be Scrutinized More Strictly than Other Transactions.

ERISA fiduciaries' duties are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). Thus, ERISA fiduciaries must handle plan assets with the highest care and prudence. *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983) (Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds); *accord*,

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.") As stringent as this standard is, ERISA treats plan assets attributable to employee contributions to an even higher standard of care than other assets held on behalf of the participants and beneficiaries.

Examples abound. Unlike benefits earned from employer contributions, an employee is automatically vested in his or her contributions. ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1). The accrual of benefits is different for benefits derived from employee contributions than from employer contributions. ERISA § 204(c), 29 U.S.C. § 1054(c). When a plan is terminated, assets of the plan are first allocated to the accrued benefit derived from non-mandatory employee contributions and then to the accrued benefit derived from mandatory employee contributions. Only then are assets allocated to benefits derived from sources other than employee contributions. ERISA § 4044(a), 29 U.S.C. § 1344(a). After all liabilities are satisfied upon a plan termination, employees are entitled to a proportionate share of the surplus derived from their contributions. ERISA § 4044(d)(3), 29 U.S.C. § 1344(d)(3). Moreover, the Department of Labor recently tightened regulations concerning the timing of deposits of employee contributions to 401(k) accounts in order to prevent employers from using the employees' contributions for corporate needs and to ensure that employees receive maximum investment gain. 29 C.F.R. § 2510.3-102 (1997); 61 Fed. Reg. 41,220 (1996).

Consequently, as high as the standard of fiduciary conduct is generally for a fiduciary's handling of plan assets, a fiduciary's decision concerning plan assets

attributable to employee contributions must be subject to even stricter scrutiny than plan assets attributable to employer contributions.

II. PARTICIPANTS MUST RECEIVE THEIR PROPORTIONATE SHARE OF A PENSION PLAN'S SURPLUS UPON TERMINATION.

A. Participants Are Entitled to Either Their Promised Benefit or Their Own Contributions Plus Interest, Whichever Is Greater.

Congress established a specific mechanism to ensure that pension participants will receive their promised benefits -- both in an ongoing plan and upon a plan termination. That mechanism must be followed. *See Geissal v. Moore Medical Corp.*, No. 97-689, 1998 WL 292075 (U.S. June 8, 1998) (Congress' mechanism for delivery of continuation health coverage must be followed as set forth in the statute).

In an on-going pension plan, participants are entitled to receive their promised defined benefit -- that is, a fixed periodic payment (or actuarial equivalent) -- if they meet the plan's participation and vesting requirements. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980) ("if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it.") And, participants are always vested in the amount of their accrued benefits derived from their own contributions. ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1). That amount is determined by adding the mandatory employee contributions and interest as specified under the statute. That amount might be more or less than the promised benefit. ERISA § 204(c)(2)(B)-(C), 29 U.S.C. § 1054(c)(2)(B)-(C).

Thus, unless there is a plan termination, regardless of how large the surplus is, the plan is under no *legal* obligation to provide more than the larger of the promised benefit or the employee contributions and imputed interest.[7] If there is no plan termination, plan assets must remain in the plan in order to satisfy future benefit obligations and ERISA's minimum funding requirements, ERISA § 302, 29 U.S.C. § 1082, and must be handled in accordance with ERISA's fiduciary rules.[8] *See generally Hancock*, 510 U.S. at 95-96.

B. Upon Termination, Participants Are Entitled to Their Proportionate Share of Any Surplus.

Where there is a termination, however, the statute clearly sets forth how employee contributions and corresponding investment income are to be handled. ERISA § 4044 states that after plan liabilities are settled, employees will receive their proportionate share of the surplus. 29 U.S.C. § 1344. Thus, equitable distribution of surplus assets requires a tracing of contributions to determine the funding of the nonforfeitable benefits.

Of particular interest is the case of *Holland v. Valhi, Inc.*, 22 F.3d 968 (10th Cir. 1994), in which the employer attempted to use the employees' contributions and corresponding income to settle all of the plan's liabilities. In rejecting the employer's decision to use employee

[7] As a policy matter, however, AARP submits that employers should review their benefit structures and provide increased benefits, as appropriate, in order to serve the interests of the participants and beneficiaries.

[8] Plan surplus assets may be transferred between a pension plan and health plan to pay for retiree health liabilities in the narrowest of circumstances and only if the detailed statutory requirements are followed. IRC § 420.

contributions to fund benefits under the allocation rules, 29 U.S.C. § 1344, the court turned to ERISA's legislative history:

> The Committee expressly rejects the idea . . . that the sum of employee contributions and earnings thereon is used first, before any employer contributions, to fund all benefits described in the allocation rules under subsection (a) ERISA section 4044 [29 U.S.C. § 1344(a)]. The application of such a rule would mean that, except in the rarest of cases, no portion of the residual assets would ever be distributed to plan participants and beneficiaries. That result was never intended.

Holland, 22 F.3d at 978, *quoting* H.R. REP. NO. 100-391(I), at 130 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-105. The court held that the liabilities must be settled in the same proportion as the contributions: that is, if the employer contributed 50% and the employees contributed 50%, each must contribute 50% toward the liabilities and each group will receive 50% of any surplus.

Accordingly, if there is a plan termination, then participants and beneficiaries are entitled to a share of the pension plan's surplus equal to their proportionate share of contributions.

CONCLUSION

AARP respectfully requests the Court to adopt the guidelines set forth herein for determining if a fiduciary breach has occurred when an employer amends its plan. AARP also requests that the mechanism established by

Congress for distribution of benefits, both prior to, and upon, plan termination be given full force and effect.

Respectfully submitted,

July 2, 1998

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